No. 86-392

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In the Supreme Court of the United States

OCTOBER TERM, 1986

ELI GORDON, GERALD TILLINGER AND SEYMOUR TILLINGER, A COPARTNERSHIP d/b/a BALSAM VILLAGE MANAGEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner's unlawful threats against and discharge of its entire workforce, in retaliation for the employees' union activities, precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 792 F.2d 29. The decision and order of the National Labor Relations Board (Pet. App. B1-B4), including the decision of the administrative law judge (Pet. App. B5-B30), are reported at 273 N.L.R.B. 420.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1986. The petition for a writ of certiorari was filed on August 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates and manages an apartment complex in Queens, New York. Late in January 1983, petitioner learned that its three maintenance workers, Carlos Casal, Mario Aguila, and Daniel Santos, had signed cards authorizing Local 32B-32J, Service Employees International Union, AFL-CIO (Union), to represent them. Pet. App. B9-B10. Approximately one week later, on February 4, 1983, petitioner summoned employee Casal to the apartment complex management office and told Casal that "[w]e cannot afford Unions here." *Id.* at B11. Petitioner instructed Casal to talk Aguila and Santos "out of the Union" (*id.* at B12) and warned that, "if the men [did not] give up the union, then they [would not] have a job." *Ibid.* Casal conveyed petitioner's warning to Aguila and Santos, but both men indicated that they "wanted" and were "sticking with the Union". *Ibid.* Casal relayed their answer to petitioner, and added that he was "sticking with the union with the men." *Ibid.* Petitioner discharged all three men that day and did not respond to the Union's request for recognition and bargaining, which petitioner received a few days later. *Ibid.*

On February 8, 1983, Casal, Aguila, and Santos began picketing petitioner's premises. Pet. App. B13. Two and one-half weeks later, on February 25, 1983, petitioner approached them and informed them that they could return to their jobs if they would renounce the Union. *Ibid.* The three men refused and continued picketing petitioner's premises until mid-April 1983. *Ibid.*

Petitioner replaced Casal, Aguila, and Santos with six other employees, three of whom were hired before the picketing ceased in mid-April 1983. Pet. App. A6. Nevertheless, in June 1983, petitioner offered unconditionally to reinstate the three dischargees. Pet. App. B14. All three men declined petitioner's offer. *Id.* at B14.

2. The Union filed unfair labor practice charges with the National Labor Relations Board. Pet. App. B6. The Board, adopting the findings and conclusions of an administrative law judge, held that petitioner had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), (5). Pet. App. B1-B4. The Board found that petitioner had unlawfully threatened to discharge and then unlawfully discharged employees Casal, Aguila, and Santo because of their union membership. *Id.* at B2-B3. As a remedy, it ordered petitioner to cease and desist from its unfair labor practices, to provide the three dischargees with back pay to the date they declined petitioner's offer of unconditional reinstatement, and to meet and bargain with the Union upon request. *Id.* at B4, B18, B24-B27.

In ordering petitioner to bargain with the Union on request, the Board acknowledged that the Union had never formally been elected as the collective bargaining representative of petitioner's maintenance workers. Pet. App. B2-B3, B18-B23. But the Board held that petitioner's "unlawful actions in discharging the three employees, comprising the entire bargaining unit, * * * [were] deliberate, egregious and pervasive" (*id.* at B21), and that, "under the circumstances shown * * *" (*ibid.*), " 'the possibility of erasing the effects of [petitioner's] past practice and of ensuring a fair election * * * by the use of traditional remedies * * * [was] slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order' " (*id.* at B22, quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969)). The Board did not believe that a fair election could be conducted; it found that "the 'employee turnover' in this case was a direct and obvious product of [petitioner's] own unlawful conduct" (Pet. App. B2) and that "withholding a bargaining order * * * would * * * 'reward[] [petitioner] * * * for his own misconduct' " (*id.* at B3, quoting *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208, 214 (2d Cir. 1980)).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A11). The court found "substantial evidence in the record to support the Board's findings that [petitioner] threatened to and did discharge its three maintenance employees on account of their union membership" (*id.* at A7). Furthermore, the court agreed with the Board that "[a]ll of the requirements for enforcement of a *Gissel* [bargaining] order ha[d] been met * * *" (*id.* at A9). In this regard, the court noted that the administrative law judge had found that petitioner's "actions had a continuing 'restraintful [*sic*] and coercive' effect after the discharge of the old employees and the hiring of the new" (*ibid.*), that "[t]he Board [had] adopted the ALJ's findings and reasoning" (*ibid.*), and that substantial evidence supported these findings (*id.* at A9-A10).

Like the Board, the court could not accept petitioner's contention that the complete turnover of the maintenance crew militated against issuance of the bargaining order. Pet. App. A10.The court noted that "[t]hree of the six new employees were hired while the discharged employees were picketing" and that these "new employees presumably [were] thus aware of [petitioner's] past treatment of its employees who chose to be represented by a union * * *" (*ibid.*). Thus, the court concluded that "the Board was well within the bounds of discretion to [find] * * * the likelihood of an untainted election remote" (*ibid.*). Concomitantly, the court noted that petitioner had itself caused the turnover and concluded that "[i]t would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge of all of the members of the bargaining unit" (*id.* at A10-A11).

Finally, the court rejected petitioner's contention that its offer unconditionally to reinstate the discharged employees made issuance of the bargaining order in this case unwarranted. Pet. App. A11. The court noted that the dischargees

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had reasonably sought other employment and that petitioner had already hired three replacement employees by the time it made the "belated" offers of reinstatement (*ibid.*). In these circumstances, "the purported offers of reinstatement did not constitute a mitigating circumstance sufficient to prevent issuance of a bargaining order" (*ibid.*).

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that substantial evidence supported the Board's finding that petitioner in fact unlawfully threatened to discharge and then unlawfully discharged employees Casal, Aguila, and Santos because of their union membership. Pet. 6. Rather, petitioner contends that the court erred in sustaining the Board's decision that petitioner must meet and bargain with the Union on request. Pet. 8-16. But the court's decision is correct and does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, this Court held that the Board may order an employer to bargain with a union not selected in a board election both in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices (395 U.S. at 613-614) and in cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (395 U.S. at 614). The Court found that precluding the Board from issuing bargaining orders in such circumstances "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain' " (395 U.S. at 610, quoting *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944)). Thus, the Court indicated that the Board may order an employer to bargain with an unelected union whenever it finds "that the possibility of erasing the effects of past practices and of

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ensuring a fair election * * * is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (395 U.S. at 614-615).

The decision below follows straightforwardly from *Gissel*. The court found substantial evidence to support the Board's finding that petitioner threatened and discharged employees Calas, Aguila, and Santos because of their union membership, thus committing "hallmark violations" of the Act (Pet. App. A8-A10). Likewise, the court found substantial evidence to support the Board's finding that the replacement employees were aware of petitioner's policy toward union adherents, thus making the likelihood of an untainted election remote (*id.* at A9-A10). And the court agreed that petitioner's offer to reinstate Casal, Aguila, and Santos, coming almost four months after their discharge, did nothing to alleviate the complete turnover in the bargaining unit that petitioner itself had caused (*id.* at A10-A11). Since these are precisely the circumstances in which the *Gissel* Court contemplated that the Board would issue a bargaining order—to prevent an employer from "delay[ing] or disrupt[ing] the election processes [or from] put[ting] off indefinitely his obligation to bargain" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 610-611 (footnote omitted))—the court's decision to uphold such an order was correct.

2. Petitioner contends that this Court should grant certiorari to clarify "the degree and type of discussion required [by] the [Board]" to justify issuance of a *Gissel* bargaining order (Pet. 8). This contention is meritless.

The courts of appeals do not need any additional instruction from this Court concerning the findings and analysis that the Board must make to justify issuance of a *Gissel* bargaining order. The courts uniformly hold that the Board can issue a bargaining order only if it finds that "serious

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unfair labor practices by the employer have made it unlikely that a representation election can be conducted free of the taint of those practices" (Pet. App. A8). Accord, *NLRB* v. *Horizon Air Services, Inc.*, 761 F.2d 22, 30-31 (1st Cir. 1985); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 263 (3d Cir. 1982); *Justak Bros. & Co.* v. *NLRB*, 664 F.2d 1074, 1081 (7th Cir. 1981); *NLRB* v. *Western Drug*, 600 F.2d 1324, 1325 (9th Cir. 1979). The courts also agree that a *Gissel* bargaining order can be sustained only if the Board has itself explained why a fair and reliable election cannot be conducted (see Pet. App. A8-A9; *NLRB* v. *American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1248 (1st Cir. 1982); *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108, 1119 (7th Cir. 1973)), or if an "ALJ has provided such findings and analysis and the Board has indicated its adoption of them" (Pet. App. A9; accord, *NLRB* v. *Horizon Air Services, Inc.*, 761 F.2d at 24 n.1; *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d at 1081-1082). In short, there is no doctrinal confusion for this Court to clear up.[1]

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[1]The cases that petitioner relies on (Pet. 8-10) are not to the contrary. While the court in *NLRB* v. *Armcor Industries, Inc.*, 535 F.2d 239, 244-245 (3d Cir. 1976), refused to enforce a *Gissel* bargaining order because the Board had not made sufficient findings to support the order's issuance, the Third Circuit has made clear on several occasions that a bargaining order will be upheld if the Board expressly finds that the order is necessary to protect employee sentiments. See, *e.g.*, *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 264-265; *NLRB* v. *Permanent Label Corp.*, 657 F.2d 512, 521 (3d Cir. 1981) (en banc), cert. denied, 455 U.S. 940 (1982). Similarly, though the court in *Kenworth Trucks of Philadelphia, Inc.* v. *NLRB*, 580 F.2d 55 (3d Cir. 1978), initially held that the Board could not rely on the findings of an administrative law judge in determining the need for a bargaining order (580 F.2d at 60), the court, on rehearing, *changed* its view (see *id.* at 61-63). Finally, while two Justices of this Court and Member Dennis of the Board have criticized the Board for issuing *Gissel* bargaining orders without adequately explaining why a fair and reliable election cannot be conducted (see *John Cuneo, Inc.* v. *NLRB*, 459 U.S. 1178, 1180-1181 (1983) (Rehnquist, J., dissenting); *Regency Manor Nursing Home*, 275

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Furthermore, contrary to petitioner's contention (Pet. 10-13, 14), the circuits are not in conflict concerning the effect employee turnover should have on the issuance of *Gissel* bargaining orders. The lower courts have uniformly held that turnover which an employer has itself caused is not a basis for finding that a fair and reliable election can be conducted. See, *e.g., NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100-101 (2d Cir. 1985); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 264-265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d at 1082. The decisions in *NLRB* v. *Western Drug*, 600 F.2d 1324 (9th Cir. 1979), and *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), on which petitioner relies (Pet. 14-15, 15-16), are not to the contrary. In those cases, the challenged unfair labor practices did not cause the employers' workforces to turn over. See *NLRB* v. *Western Drug*, 600 F.2d at 1326-1327; *Franks Bros. Co.* v. *NLRB*, 321 U.S. at 706 (explaining *Fansteel*). Thus, those cases do not conflict with cases holding that a *Gissel* bargaining order is appropriate where the employer's unfair labor practices are in fact responsible for the turnover in the workforce.

Finally, petitioner's contention (Pet. 13-15) that the Board and the court below failed to articulate a rational basis for imposing a bargaining order is contrived. The Board and the court clearly articulated a rational basis for their decisions: the Board, adopting the findings and conclusions of the administrative law judge (see Pet. App. B2), concluded that a fair and reliable election could not be conducted (*id.* at B2-B3, B21-B23). The court, reviewing the Board's decision, found substantial evidence to support

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N.L.R.B. No. 171 (July 31, 1985) (opinion of Member Dennis)), those criticisms have no application to the issues in this case, where the Board expressly found that, and fully explained why, an election cannot be conducted free of the taint of petitioner's unfair labor practices. See Pet. App. A8-A10; *id.* at B2-B3, B21-B23.

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findings that petitioner's actions had a continuing impact on unit employees (Pet. App. A9-A10) and that there were no "mitigating circumstance sufficient to prevent issuance of a bargaining order" (*id.* at A11). Petitioner's true complaint is not that the decisions of the Board and the court have no rational basis, but rather that the factual findings on which those decisions are based are wrong. See Pet. 7-8, 13-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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